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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1229

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENT MCI TELECOMMUNICATIONS CORPORATION IN OPPOSITION

Respondent MCI Telecommunications Corporation ("MCI")[1] hereby submits its brief in opposition to

[1] Both MCI Telecommunications Corporation and its sister subsidiary, MCI-New York West, Inc., participated fully in the proceedings below. MCI-New York West, Inc., however, has been recently merged into MCI Telecommunications Corporation. "MCI" is utilized throughout this brief to describe either MCI Telecommunications Corporation or the MCI group of affiliated companies.

the petition of American Telephone and Telegraph Company, et al., for a writ of certiorari to review a judgment of the United States Court of Appeals for the Third Circuit.

QUESTIONS PRESENTED

1. Was the court below correct in upholding the decision of the Federal Communications Commission ("FCC" or "the Commission") requiring the telephone companies to provide local distribution facilities for the specialized common carriers? The FCC's decision concluded that proceeding by rule making rather than by *ad hoc* adjudication in the promulgation and implementation of its policy complied with the requirement of Section 201(a) (47 U.S.C. § 201(a)) of the Communications Act that petitioners be accorded an opportunity for hearing.

2. Was the court below correct in upholding the FCC's decision that its proceedings which led to the adoption of the interconnection orders afforded petitioners adequate notice of the nature of the interconnection required?

3. Was the court below correct in upholding the FCC's action in rejecting petitioners' local distribution tariffs, which attempted to abrogate unilaterally existing contracts between petitioners and Western Union?[2]

COUNTERSTATEMENT OF THE CASE

This case concerns the challenge by petitioners, American Telephone and Telegraph Company and a

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[2] Respondent MCI relies on the briefs of respondents Federal Communications Commission and Western Union Telegraph Company on this point.

number of telephone operating companies of the Bell System, to a cease and desist order of the Federal Communications Commission requiring the American Telephone and Telegraph Company and affiliated Bell System Companies (hereinafter "AT&T") to provide certain communications services and facilities to respondent MCI and to other communications common carriers and prohibiting petitioners from engaging in certain discriminatory practices. This order was the culmination of long and protracted proceedings before the Federal Communications Commission in which AT&T fully participated and as a result of which the FCC concluded that competition in the private line communications field would be in the public interest.[3] Private line services are generally sold to high volume communications users such as business and government organizations. Such users are provided with private circuits for the transmission of communications between termination points specified by the customer. The service gives the customer continuous communication between these specified points without requiring the establishment of a new connection for each call or message.[4]

From the outset it has been recognized that achievement of "end-to-end" customer service in connection with intercity services and facilities offered by MCI

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[3] See *Microwave Communications, Inc.*, 18 FCC 2d 953 (1969), *reconsid. denied*, 21 FCC 2d 190 (1970); *Specialized Common Carrier Services* (Docket No. 18920), 29 FCC 2d 870, *reconsid. denied*, 31 FCC 2d 1106 (1971), *aff'd sub nom. Washington Utilities and Transportation Comm'n* v. *FCC*, Nos. 71-2919 and 72-1198 (9th Cir. Jan. 20, 1975), *rehearing denied*, March 12, 1975.

[4] See 503 F.2d at 1254, n. 3 (Petitioners' Appendix ("Pet. App.") 7a, n.3).

and other specialized carriers would require termination by interconnection with the communications facilities or services of other existing common carriers, the local telephone companies. Although MCI's network is currently providing communications services to over 500 customers located in 29 cities in the United States, the MCI network does not extend to its customers' premises or other termination points but instead stops at MCI's city terminals. With minor exceptions, MCI must, therefore, rely upon AT&T affiliates to provide local interconnection, the communication bridge between MCI's city terminals and its customers' termination points. By virtue of the FCC's decision, AT&T affiliates are today providing MCI and others with these required local interconnections. Continued provision of local interconnection is absolutely necessary to the economic viability of MCI and the other specialized common carriers. Accordingly, the Commission has many times enunciated its policy that the established carriers having such local distribution facilities should upon request permit interconnection or leased channel arrangements with specialized carriers on reasonable terms and conditions, and that, in instances where a carrier has monopoly control over essential facilities, no discrimination would be countenanced in favor of an affiliated carrier nor would favoritism among competitors be permitted. The Commission has also made it clear that the obligation to interconnect requires the telephone companies to provide the facilities or services essential to the rendition by MCI and other specialized carriers of all their authorized interstate communications services.

Two particular categories of private line service are specifically in issue in this case, the Foreign Ex-

change Service (FX) and Common Control Switching Arrangements (CCSA).[5] FX and CCSA are clearly private line services; they are so classified by AT&T itself.[6] What petitioners allege is that the FCC's order requiring AT&T to provide the interconnections necessary for the delivery of FX and CCSA services and which directs AT&T to cease and desist from practices which delay interconnection and deny services to the specialized carriers on a par with AT&T's own private line service division, the Long Lines Department, is defective on a number of procedural and substantive grounds. However, after a full and complete

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[5] "FX" and CCSA" are defined by the Federal Communications Commission as follows:

> "Foreign Exchange (FX) is a private line service that is partially 'switched'. It allows a businessman located in one state to, in effect, maintain a local phone in another state. Under FX, for example, a businessman in Washington can be reached by telephone subscribers in New York City and can himself reach New York City telephone subscribers (through a local loop in Washington, a Washington-New York interchange line, and a business line in the New York City exchange area). However, New York City telephone subscribers could not reach Washington subscribers other than the Washington businessman over FX private line service and the latter would have to maintain a separate telephone in order to tie into the Washington exchange area.
>
> "A Common Control Switching Arrangement (CCSA) is a private line system for linking the various offices of a large company through large switches on a local telephone company's premises instead of through PBX switches on the customer's premises. The private line circuits furnished in CCSA are provided for the exclusive use of the CCSA customer. However, the switching machines are shared with other private line service customers."

In the Matter of Bell System Tariff Offerings, 46 FCC 2d at 418, n.5 (Pet. App. 9b-10b, n.5).

[6] 46 FCC 2d at 425 (Pet. App. 22b).

analysis and review of petitioners' contentions, both the FCC and the lower court held that the order was in compliance with all applicable statutory, administrative law, and constitutional requirements.

As will be set forth in more detail below, the petition for writ of certiorari is bottomed on a fundamental mischaracterization of the various proceedings leading up to the issuance of the cease and desist order as unrelated fragmentized proceedings, rather than a logical progression designed initially to make policy and later to enforce it. Both the FCC and the court below found to the contrary and the lower court held that the cease and desist order was "a device for enforcing previously articulated responsibilities, and not . . . an independent proceeding."[7] Once this proposition is understood, the legal issues involved in this case become clear.

A. The FCC Proceedings

1. *The MCI Case.* The Commission first considered the provision of private line services by specialized common carriers in *Microwave Communications, Inc.*, 18 FCC 2d 953 (1969), *reconsid. denied,* 21 FCC 2d 190 (1970). MCI proposed to offer its subscribers a specialized common carrier microwave service between Chicago, Illinois and St. Louis, Missouri via nine intermediate points "making it incumbent upon each subscriber to supply his own communications link between MCI's sites and his place of business (loop service)." (*Id.* at 953-54). The applications were designated for an evidentiary hearing in which MCI participated, as did a number of existing carriers opposed to the institution of competitive new service, including AT&T and the operating Bell System Companies in the terri-

[7] 503 F.2d at 1263 (Pet. App. 26a).

tories involved. In arriving at its determination that the service proposed by MCI was in the public interest, the Commission noted that MCI's ability to market its services was dependent upon the ability of its subscribers to secure interconnection service from the local telephone companies serving the terminal areas. Nothing the carriers' professed "intransigence" on this score, the FCC declared:

> "Since [the existing carriers] have indicated that they will not voluntarily provide loop service we shall retain jurisdiction of this proceeding in order to enable MCI to obtain from the Commission a prompt determination on the matter of interconnection. Thus, at such time as MCI has customers and the facts and details of the customers' requirements are known, MCI may come directly to the Commission with a request for an order of interconnection. We have already concluded that a grant of MCI's proposal is in the public interest. *We likewise conclude that, absent a significant showing that interconnection is not technically feasible, the issuance of an order requiring the carriers to provide loop service is in the public interest.*" (emphasis added)

18 FCC 2d at 965.

2. *The Docket No. 18920 Proceeding.* Grant of the initial MCI applications triggered the submission of a large number of specialized common carrier applications—by MCI and by other applicants. Because the applications raised certain common questions, the Commission instituted a proceeding entitled *Notice of Inquiry to Formulate Policy, Notice of Proposed Rule Making, and Order in Docket No. 18920,* 24 FCC 2d 318 (1970), looking towards the formulation of appropriate policies with respect to the matters set forth

in the Notice. The proceeding was instituted under the provisions, *inter alia,* of Sections 4(i), 201 and 303 of the Communications Act of 1934, as amended (47 U.S.C. §§ 154(i), 201 and 303). In the Notice the Commission specified five separate issues, the two relevant to this case being (24 FCC 2d at 327):

> "A. Whether as a general policy the public interest would be served by permitting the entry of new carriers in the specialized communications field; and, if so,
>
> * * * * *
>
> "E. What is the appropriate means for local distribution of the proposed services?"

The Commission's Notice set forth a detailed analysis by its staff of basic legal and economic considerations involved, including tentative conclusions to be derived therefrom. Voluminous comments were filed by the specialized common carrier applicants, AT&T and its operating companies, independent telephone companies, other carriers, scores of businesses and business associations and other interested parties (see 29 FCC 2d at 945-980). All of the parties were also given an opportunity to present their views and arguments at a lengthy oral argument. After such submissions the Commission issued a detailed *First Report and Order,* 29 FCC 2d 870 (1971). The Commission concluded as to Issue A (29 FCC 2d 920):

> "In light of all the foregoing and the record as a whole, we adopt our staff's analysis of Issue A, as amplified and modified herein. We find that: there is a public need and demand for the proposed facilities and services and for new and diverse sources of supply, competition in the specialized communications field is reasonably feasible, there

are grounds for a reasonable expectation that new entry will have some beneficial effects, and there is no reason to anticipate that new entry would have any adverse impact on service to the public by existing carriers such as to outweight the considerations supporting new entry. We further find and conclude that a general policy in favor of the entry of new carriers in the specialized communications field would serve the public interest, convenience, and necessity."

So far as Issue E is concerned, no substantive material was presented by the existing carriers as to their earlier claims that interconnection was not technically feasible.[8] The Commission concluded as to Issue E (29 FCC 2d at 940):

"We reaffirm the view expressed in the *Notice* (paragraph 67) that established carriers with exchange facilities should, upon request, permit interconnection or leased channel arrangements on reasonable terms and conditions to be negotiated with the new carriers, and also afford their customers the option of obtaining local distribution service under reasonable terms set forth in the tariff schedules of the local carrier. Moreover, as there stated, 'where a carrier has monopoly control over essential facilities we will not condone any policy or practice whereby such carrier would discriminate in favor of an affiliated carrier or show favoritism among competitors'. In view of the representations of AT&T and GT&E in this

[8] In the order designating Docket No. 18920 for oral argument the Commission requested the parties "to address the question of what, if any, specific information would be adduced in any evidentiary hearing which is of material importance and has not been, or could not have been, filed in the record of this proceeding." 29 FCC 2d at 917. No such material or comments were filed by AT&T on Issue E.

proceeding,[9] upon which we rely, and the self-interest of other independent telephone companies in not losing potential new business, there appears to be no need to say more on this question at this time. Should any future problem arise, we will act expeditiously to take such measures as are necessary and appropriate in the public interest to implement and enforce the policies and objectives of this Decision." (footnote omitted)

The Commission thereafter terminated the proceeding as far as Issue A and other issues were concerned, but expressly retained full jurisdiction over Issue E (29 FCC 2d at 942).[10]

3. *The Commission's October 4, 1974 Letter Order.* For a two year period following the decision in Docket No. 18920, MCI, in reliance on that decision and on the interconnection representations of the existing carriers, built its original Chicago-St. Louis System, expanded its system significantly at substantial cost, and conducted extensive negotiations with the Bell companies for interconnection. In the summer of 1973, there was a developing consensus between AT&T and

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[9] The AT&T representations referred to are as follows (29 FCC 2d at 939):

"When the Commission determines that it is in the public interest to license additional intercity common carriers, we would be willing to discuss with them the technical arrangements required and appropriate charges for *any* connections required of the telephone companies." (emphasis added)

GT&E represented that with adequate lead time it too would provide local distribution services to any authorized carrier.

[10] Petitioners did not appeal the Commission's decision in Docket No. 18920. An appeal from the decision to the Ninth Circuit by other parties resulted in an order affirming the Commission's decision, see n.3, *supra*.

MCI as to a working agreement and AT&T even signed interim interconnection agreements with MCI. However, shortly before Labor Day, 1973 Bell's whole attitude toward interconnection changed and its earlier "intransigence" reappeared. It unilaterally broke off negotiations for final interconnection agreements (see A. 9-11;[11] see also 369 F. Supp. 1004 at 1010 (E. D. Pa. 1974)). There then followed an exchange of letters among the Commission, MCI and AT&T concerning MCI's requests for interconnection and the frustrations it had experienced at AT&T's hands in obtaining interconnection. The culmination of the exchange of correspondence was a "By Direction of the Commission" letter from the Chairman of the Commission to AT&T dated October 4, 1973 (A. 28). In this letter order the Commission reaffirmed its earlier *MCI* and Docket No. 18920 rulings requiring the telephone companies to provide interconnection to specialized carriers. The Commission's order stated (A. 30):

> "[E]ffective implementation of our policy objectives and the statutory scheme of the Communications Act require that you promptly file tariff schedules with this Commission in accordance with Section 203 of the Communications Act which tariff schedules will provide the interconnection facilities essential to the rendition by the specialized carriers of all their authorized services on terms and conditions which are just, reasonable and non-discriminatory. Until such tariffs are filed and effective, there should be no delay in honoring requests of specialized carriers for interconnection facilities required by such carriers to terminate the services they are authorized by the

[11] References to "A" are to the Appendix in the lower court which has been lodged by petitioners with the Clerk of this Court. See Pet. Brief p. 5, n.6.

Commission to furnish. Such facilities can be provided under contract on an interim basis and we assume that this will be done." [12]

4. *The Docket No. 19896 Proceeding.* Finally, on December 13, 1973 the Commission issued a *Memorandum Opinion and Order to Show Cause in Docket No. 19896* (A. 130). It described the various complaints of the specialized carriers and referred to the earlier proceedings in *MCI* and *Specialized Common Carrier Services, inter alia,* requiring interconnection by the telephone companies with MCI and other specialized common carriers. It concluded that, on the record before the Commission, there were no material disputed facts and thus no necessity for holding an evidentiary hearing.

The Commission directed the parties to file briefs and participate in oral argument on four issues as follows (A. 140):

"[W]hether (1) the Commission has heretofore ordered the telephone companies, pursuant to Sec-

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[12] Subsequent to the October 4, 1973 letter order, MCI commenced an action in the Eastern District of Pennsylvania pursuant to 47 U.S.C. § 406 to compel AT&T to provide FX, CCSA and other related services. While this action was pending the Commission instituted the show cause proceeding described *infra.* Prior to the Commission's decision in the show cause proceeding, the district court issued an extensive memorandum opinion upholding MCI's contentions and ordering AT&T, to interconnect. *MCI Communications Corp.* v. *AT&T,* 369 F. Supp. 1004 (E.D. Pa. 1974). On appeal, strictly as a matter of primary jurisdiction (see 503 F. 2d at 1263, Pet. App. 25a-26a), the United States Court of Appeals for the Third Circuit vacated the district court's injunction and returned to the FCC the responsibility for clarifying AT&T's duties to the specialized common carriers. See *MCI Communications Corp.* v. *AT&T,* 496 F.2d 214 (3rd Cir. 1974).

tion 201(a) of the Communications Act, to provide interconnection with MCI or whether such interconnection is otherwise required pursuant to rule or regulation within the meaning of Section 312 of the Act; (2) if so, (a) the scope of that order or rule or regulation with particular reference to interconnection for FX and CCSA services of MCI; (b) whether the telephone companies have complied with such order, rule or regulation and, (c) if they have not complied, the appropriate remedy, whether under Section 312 of the Act or otherwise; (3) if interconnection has not hitherto been ordered or required by rule or regulation whether it should be and, if so, upon what terms and conditions; and (4) whether the Commission should affirm, reverse or modify the Staff action of October 19, 1973 for which review is here requested."

Briefs and other written material were submitted by MCI, petitioners, and others, and they participated in a full day of oral presentation before the Commission *en banc*. The Commission thereafter issued the decision here in question (Pet. App. B) in which it discussed all of the contentions of the parties, described the prior proceedings, and pointed out that petitioners and other carriers have been accorded an "opportunity for hearing" on the interconnection issue in the *MCI* proceeding—where a decision was made with respect to interconnection, even though no order for interconnection was issued—and in the *Specialized Common Carrier Services* rule making proceeding in Docket No. 18920. The Commission specifically pointed out that the inquiry in Docket No. 18920 included an issue as to the appropriate means of local distribution for specialized carriers for their proposed services. The Commission noted, on the basis of the showing in the

proceedings to date, that adequate grounds existed for issuance of the interconnection order under Section 201(a) and stated that it did not find the existence of material factual disputes which would require an adjudicatory hearing. The Commission concluded (46 FCC 2d at 423, Pet. App. 19b):

> "[I]n view of the Commission decision in *MCI* and the policy determinations and conclusions set forth in the *Specialized Common Carrier Services* proceeding, we find that our previous orders were broad enough to require the telephone companies to provide interconnection facilities for MCI and other specialized carriers on a non-discriminatory basis for all services provided to an affiliated or other carrier in competition with the authorized services of the new specialized carriers absent a significant showing that such interconnection is not technically feasible."

The Commission then addressed itself to the contentions of petitioners that prior Commission orders did not mention FX and CCSA services and consequently did not encompass interconnection facilities for such purposes. The Commission had two answers. First, it pointed out in detail the basis for its determination that its "prior orders covered interconnection for the broad range of services which the specialized carriers are authorized to provide and that Bell has been directed to furnish interconnection facilities for the purpose of enabling MCI and the other specialized carriers to provide all such services, including FX and CCSA type services." (46 FCC 2d at 426-27, Pet. App. 25b) Second, the Commission proceeded anew to consider the argument advanced by petitioners in the Docket No. 19896 proceeding that substantial and significant differences existed between interconnections

for FX and CCSA and interconnections for other private line services. The Commission analyzed the petitioners' material in detail and found that no basis existed for the argument. Accordingly, after specifically finding that AT&T had discriminated against MCI and the other specialized carriers by denying them the interconnection privilege provided to AT&T's own Long Lines Department, the Commission issued the order involved here requiring AT&T to provide FX and CCSA services to the specialized carriers on a nondiscriminatory basis.[13]

B. The Court Proceeding

There then followed petitioners' appeal in the United States Court of Appeals for the Third Circuit. The court below affirmed the Commission's decision in all respects (Pet. App. A).

ARGUMENT

This case presents no important or unresolved issues requiring action by this Court. It involves a proceeding where petitioners were accorded the full panoply of rights required by the statute involved and by decisions of this Court. AT&T's argument that it was entitled to an evidentiary hearing is refuted by such decisions of this Court as *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956), *FPC* v. *Texaco Inc.*, 377 U.S. 33 (1964), *United States* v. *Florida East Coast R. Co.*, 410 U.S. 224 (1973), and *United States*

[13] The Commission as part of its decision in Docket No. 19896 also adopted an order rejecting the tariffs filed by the Bell System Companies to the extent that the tariffs related to facilities and services covered by the Bell-Western Union exchange of facilities contracts (46 FCC 2d at 436-37, Pet. App. 42b-43b). See n.2, *supra*.

v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972). AT&T's argument that it was denied adequate notice of the FCC's action requiring interconnection is a narrow question of whether in fact AT&T was adequately provided with such notice, a question clearly resolved against AT&T both by the FCC and by the court below.

It is central to an understanding of this case to realize that although the petition for writ of certiorari technically concerns the FCC's decision in Docket No. 19896, the FCC and the court below specifically found that the show cause proceeding which resulted in that decision cannot be isolated from the series of prior proceedings set forth above. The orders contained in the Commission's decision involved principles, policies and directives regarding interconnection which had been set forth and developed in three interrelated proceedings: The initial decision in *Microwave Communications, Inc.*, 18 FCC 2d 953 (1969), *reconsid. denied*, 21 FCC 2d 190 (1970), the *Specialized Common Carrier Services* decision in Docket No. 18920, 29 FCC 2d 870, *reconsid. denied*, 31 FCC 2d 1106 (1971), *aff'd sub nom. Washington Utilities and Transportation Comm'n.* v. *FCC*, Nos. 71-2919 and 72-1198 (9th Cir., Jan. 20, 1975), *rehearing denied*, March 12, 1975, and, finally the decision in Docket No. 19896 itself, which is the one involved here. Throughout the petition, AT&T attempts to segment these proceedings by picking and choosing, quoting and analyzing from one or another decision, while conveniently ignoring other relevant parts of the course of proceedings employed by the FCC in directing interconnection and then enforcing compliance with its orders. When the entire course of the proceedings is analyzed, it becomes clear that the Commission has accorded to the affected par-

ties notice of the breadth of interconnection requirements it intended to consider and might adopt, has given those parties the opportunity for hearing required by the law and has based its decision on adequately expressed reasons designed to effectuate the public interest.

I.

What petitioners call the "statutory issue" (Pet. Brief p. 19)—and the court below called the "per se statutory construction" issue[14]—is an argument that as a matter of statutory construction Section 201(a)'s requirement of an "opportunity for hearing" must be interpreted to compel an evidentiary hearing. AT&T cites neither legislative history nor case law interpreting the statute to support its contention. Its argument is based on the assertion that the words of the statute itself and the FCC's past practice in interpreting the statute lead to the conclusion that an evidentiary hearing is required. These arguments are contrary to decisions of this Court and were correctly rejected by the FCC and the court below.

It first must be recognized that the Communications Act confers upon the FCC broad and flexible procedural powers with which to achieve its substantive goals.[15] Section 4(i) (47 U.S.C. § 154(i)) authorizes the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." Section 303(r) (47 U.S.C. § 303(r)) authorizes the Commission to "[m]ake such

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[14] 503 F.2d at 1264-66 (Pet. App. 28a-31a).

[15] *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968); *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943).

rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act . . . ." In short, exercise of the Commission's statutory responsibilities "leaves wide discretion and calls for imaginative interpretation."[16]

It is a well established principle of administrative law that, absent a clear statutory mandate to the contrary, administrative agencies have the discretion to proceed in the consideration of problems by rule making, adjudication or other procedures considered appropriate by the agency in the particular circumstances. E.g., *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947). This principle was specifically applied to the FCC in the landmark case of *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956). *Storer* held that the "full hearing" requirement of Section 309 of the Communications Act does not mean that the FCC is bound to follow a particular procedure. The method of meeting the requirement is left to the agency's own devising—to its informed judgment and discretion, exercised in light of the particular circumstances and the practical necessities of efficient administration. This principle has been consistently applied against the contention that "full hearing" necessarily means something more than a rule making proceeding.[17] It is,

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[16] *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 90 (1953).

[17] See *FPC* v. *Texaco Inc.*, 377 U.S. 33 (1964); *Air Line Pilots Assoc.* v. *Quesada*, 276 F.2d 892 (2nd Cir. 1960), *cert. denied*, 366 U.S. 962; *American Airlines, Inc.* v. *CAB*, 359 F.2d 624 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 843; *California Citizens Band Assoc.* v. *United States*, 375 F. 2d 43 (9th Cir. 1967), *cert. denied*, 389 U.S. 844; *Transcontinent Television Corp.* v. *FCC*, 308 F.2d 339 (D.C. Cir. 1962); *WBEN, Inc.* v. *United States*, 396 F.2d 601 (2nd Cir. 1968), *cert. denied*, 393 U.S. 914; *Logansport Broadcasting Corp.* v. *United States*, 210 F.2d 24 (D.C. Cir. 1954).

therefore, clear that there is ample precedent supporting the FCC's decision to use rule making rather than adjudication in the present case, and the course it adopted complied fully with the requirements of Section 201(a) of the Act.

Moreover, petitioners' contention that the words "opportunity for hearing" in Section 201(a) require an evidentiary hearing is disposed of by this Court's recent decision in *United States* v. *Florida East Coast R. Co.*, 410 U.S. 224 (1973). See also *United States* v. *Alleghany-Ludlum Steel Corp.*, 406 U.S. 742 (1972). The *Florida East Coast* decision, somewhat cavalierly dismissed by petitioners, clearly establishes that the statutory phrase "opportunity for hearing" is neutral; it no more requires an evidentiary hearing than does the equivocal phrase "proceeding". As this Court recognized: [18]

> "The term 'hearing' in its legal context undoubtedly has a host of meanings. Its meaning undoubtedly will vary, depending on whether it is used in the context of a rule-making-type proceeding or in the context of a proceeding devoted to the adjudication of particular disputed facts." (footnote omitted)

AT&T's argument based on the bare words of the statute, unsupported by any citation to the legislative history, is without merit.

Petitioners' other argument on the "statutory issue" is that in prior cases, such as *Western Union Telegraph Co.*, 17 FCC 152 (1952), *reconsid. denied*, 17 FCC 503 (1953), the Commission has relied on adjudicatory proceedings in Section 201(a) proceedings. This argu-

[18] *United States* v. *Florida East Coast R. Co.*, 410 U.S. at 239.

ment is also without merit. While in *Western Union* the Commission did proceed by means of an adjudicatory hearing, the Commission is not tied to that particular procedure.[19] In responding to petitioners' argument on this point, the lower court correctly noted that as the complex field of communications develops and changes, procedural as well as substantive policy must remain flexible. The mere fact that an agency once regarded evidentiary hearings as appropriate does not bar it from adopting other methods when changing or new circumstances require a different approach.[20] The FCC's determination that rule making, rather than adjudication, was the appropriate vehicle to establish the general policy that AT&T must interconnect with the specialized carriers was a decision well within the discretion and the competence of the FCC.

Thus, the decision of the court below rejecting petitioners' argument that as a matter of statutory construction Section 201(a) requires an evidentiary hearing is clearly correct.

Petitioners (Pet. Brief pp. 22-25) attempt to recast this statutory argument in somewhat different terms by characterizing the proceeding as "adjudication" and urging "that in an adjudicatory proceeding, where important interests are at stake and disputed issues of material fact have been raised, an opportunity to have evidence submitted, tested, and evaluated before a deci-

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[19] [A]ny Agency is free . . . to accord litigants appearing before it more procedural rights than the Act requires . . . ." *United States* v. *Florida East Coast R. Co.*, 410 U.S. at 236, n.6.

[20] See 503 F.2d at 1264-65 (Pet. App. 28a-29a); see also *Phillips Petroleum Co.* v. *FPC*, 475 F.2d 842 (10th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974).

sion is reached is mandatory." This is merely another attempt by petitioners to fragmentize the proceedings, to focus all attention on the show cause proceeding, and to insist on their own view of what took place despite the rulings of the Commission and the court to the contrary. As both the FCC and the court below found, the show cause proceeding was an interrelated proceeding following, and built upon, a full-scale rule making proceeding in which the parties were put on notice as to the issues and policy considerations involved and in which all interested parties were given a full opportunity to present their data and views both in written comments and by oral presentations before the Commission *en banc*. Moreover, in the show cause proceeding itself the parties were again given an opportunity in the form of written submissions and oral presentations before the Commission to address all the relevant issues. Thus, insofar as petitioners' contention is bottomed on its assertion that the present proceeding "began with a show-cause order directed against the Bell System" (Pet. Brief p. 23), its argument must be rejected as totally unsound and misleading.

To the extent that the position of petitioners (Pet. Brief pp. 23-25) can be read to argue that an evidentiary hearing is required because of the nature of the issues involved, even considering Docket No. 18920 and Docket No. 19896 as interrelated proceedings, this argument too must be rejected. Petitioners were accorded the opportunity to come forward with written material and to make oral presentations at least twice during the course of the interrelated proceedings. In each proceeding the FCC gave detailed notice of the matters to be covered, gave careful and detailed consideration to the matters raised, discussed the submis-

ions of the parties, made detailed findings with respect to all relevant issues, and finally adopted conclusions related to the statutory standards governing the relief requested. In each instance where a claim was made that there were disputed facts allegedly requiring an evidentiary hearing, the Commission, which has years of accumulated expertise in the regulation of the telephone network, made detailed findings as to why such claims were unsupported or were not relevant to the statutory objectives which the Commission is directed to achieve.[21]

Petitioners were thus given two separate opportunities to persuade the FCC that it should not order FX and CCSA interconnection. In both proceedings AT&T was given notice of the Commission's broad intentions and was afforded the opportunity to present its facts and arguments against the proposed interconnection. Inasmuch as petitioners can legitimately claim neither surprise nor denial of the opportunity to speak meangfully to the issues before the Commission, its contention that it was denied the "opportunity for hearing" required by due process of law must be rejected.

II

Petitioners' final argument (Pet. Brief pp. 26-32) is cast in the form of an allegation that the decisions below are contrary to the principle of *Morgan* v. *United States,* 304 U.S. 1 (1938). When stripped to essentials,

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[21] In view of AT&T continuous reference to the shibboleth of "network harm", it is interesting to note, as petitioners themselves point out (Pet. Brief pp. 31-32, n.48), that AT&T and the specialized carriers have already achieved agreement for interconnection, including FX and CCSA, which the FCC has accepted. See *Memorandum Opinion and Order in Docket No. 20099,* FCC 75-450, released May 7, 1975.

the argument comes down to petitioners' contention that the court below erred in upholding the interconnection order by sustaining the FCC's reliance on the *Specialized Common Carrier Services* decision. This is a narrow question of whether in fact AT&T was provided with adequate notice, a question extensively briefed by the parties before the FCC, decided contrary to the AT&T's position by the Commission, and upheld by the court below. The decision of the lower court is clearly correct and, in any event, this is not a novel or important issue of law under the standards of Supreme Court Rule 19 which should lead this Court to grant the writ of certiorari.

There is nothing equivocal about the decision of the court below on this point. The court held:

> "[W]e are convinced that the Commission's decision in Docket 18920 includes a direction to the established carriers to provide FX and CCSA to the specialized carriers on a non-discriminatory basis."

503 F.2d at 1259 (Pet. App. 19a).

The basis of this decision by the court below is amply supported by the record.[22] In brief, the court relied upon the following factors:

(1) The breadth of the Notice in Docket No. 18920 (24 FCC 2d 318) and the fact that it concerned the general topic of entry of new carriers in the private

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[22] AT&T's petition contains the somewhat cryptic contention (Pet. Brief p. 31, n.47) that the lower court's decision "nowhere comes to grips with the *Morgan* argument actually made by the Bell System". As set forth *infra* and at 503 F.2d 1269-70 (Pet. App. 37a-39a), the lower court did specifically resolve the *Morgan* argument adversely to AT&T.

line services field indicates that FX and CCSA were encompassed within Docket No. 18920. Thus, since the rule making itself went to the totality of competition in the provision of all private line services (Issue "A"), the generalized interconnection inquiry (Issue "E") also went to the totality of private line services, including FX and CCSA.[23] (503 F.2d at 1260, Pet. App. 19a)

(2) The Commission, in its decision in Docket No. 18920, considered the possibility of "total diversion" of AT&T's private line revenues as a result of the competition from the specialized carriers. This indicated the Commission's assumption that the new entities would provide services similar to the private line services being furnished by the established carriers. Since FX and CCSA account for a substantial share of AT&T's private line revenues, the reference to total diversion indicates that FX and CCSA were within the Commission's contemplation: (503 F.2d at 1260-61, Pet. App. 19a-22a)

(3) The Commission's directive that it contemplated "full and fair competition in the specialized field among all carriers, both established and new . . . ."[24] indicates that the Commission intended to authorize the new carriers to provide all elements of the private line services then being furnished by the established carriers, rather than an incomplete "package" of private line services. The Commission's finding that the provision of interstate private line service should be on a full, fair and nondiscriminatory basis would be mean-

[23] As set forth at p. 5, *supra*, it is important to note that AT&T itself classifies FX and CCSA as private line services.

[24] 29 FCC 2d at 916 (1971).

ingless without the provision of the full range of private line services. (503 F.2d at 1261-62, Pet. App. 22a-23a)

(4) The narrow interpretation sought by petitioners here would frustrate the basic objectives enunciated in the Docket No. 18920 proceeding, in which the Commission repeatedly used the generic term "private line service", which put AT&T on notice that it would be expected to provide interconnections for the full range of such services. The denial of interconnection facilities for the specialized common carriers similar to those provided to AT&T's "affiliated carrier", the Long Lines Department, would place them at a definite disadvantage in obtaining customers and frustrate the Commission's objectives in authorizing entry by the specialized carriers. (503 F.2d at 1262, Pet. App. 23a)

The "evidence" set forth by AT&T in opposition to this conclusion is slim indeed. In order to attempt to rebut the well-reasoned conclusions of the lower court, petitioners rely on ambiguous statements made in Commission briefs in related Ninth and Second Circuit proceedings and on a statement taken out of context from the decision of the court below.

Petitioners (Pet. Brief p. 28) make much of a statement in the Commission's brief filed in the Ninth Circuit, which later affirmed the Commission's decision in the *Specialized Common Carrier Services* case, *Washington Utilities and Transportation Comm'n.* v. *FCC*, Nos. 71-2919 and 72-1198 (9th Cir. Jan. 20, 1975), *rehearing denied,* March 12, 1975. The Commission's brief contained the statement that the *Specialized Common Carrier Services* decision did not contemplate interconnection of the specialized common carriers into

the switched network (see Pet. App. F). However, the appeal in the Ninth Circuit did not involve the matter of interconnection, as AT&T itself admits (Pet. Brief p. 29, n. 45). The brief's reference to interconnection was therefore gratutious and in any event the Commission has indicated, and the lower court agreed, that any such representation was unintentional.[25] Similarly, petitioners' reliance on the Commission's cautious statement in the Second Circuit case (which was a precautionary appeal taken by AT&T from the Commission's letter order of October 4, 1973) is also misplaced. In his brief, the Commission's General Counsel said that the Commission *could* rule in Docket No. 19896 that it was never its intention to allow MCI to provide FX or CCSA service. This statement is entirely obviated by the Commission's—and the court's—subsequent clear holdings that the *Specialized Common Carrier Services* decision *did* indeed contemplate interconnections for such services. The statement simply sets forth an academically possible result. That possibility of course, did not eventuate.

Petitioners' reliance (Pet. Brief p. 27) on the lower court's statement that "[t]here is no mention of FX and CCSA in the *Specialiezd Common Carrier Services* decision" is misleading since it is taken out of context. The paragraph from which this quotation was taken reads in full as follows:

> "*At first glance,* AT&T's characterization of the proceedings appears to have merit. There is no mention of FX or CCSA in the *Specialized Common Carrier Services* decision. Instead, the Commission speaks only generally of 'private line services,' without reference to the components of such service. Nevertheless, upon closer examination, *we are convinced that the Commission's decision in*

[25] 503 F.2d at 1260, n.12 (Pet. App. 19a, n.12). See 46 FCC 2d at 425, n.14 (Pet. App. 226, n.14).

> *Docket 18920 includes a direction to the established carriers to provide FX or CCSA to the specialized carriers on a non-discriminatory basis.* We base this conclusion upon a number of factors." (emphasis added)

503 F.2d at 1259 (Pet. App. 18a-19a).

It is thus clear that AT&T's reliance on this statement by the lower court provides no support for its *Morgan* argument.

Petitioners' final point of contention is based on the Third Circuit's earlier decision vacating the injunction granted to MCI by the district court.[26] The court below clearly and unequivocally rejected AT&T's reading of its first opinion.[27] As set forth by the lower court, the vacation of the district court's affirmative injunction was a matter of primary jurisdiction only. Since the FCC had already announced that it would consider the precise question in its Docket No. 19896 proceeding, the court felt that it would be beneficial for the court to await the FCC's decision before proceeding with the mandamus case.[28]

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[26] *MCI Communications Corp.* v. *AT&T*, 496 F.2d 214 (3rd Cir. 1974), see n.12, *supra*.

[27] See 503 F.2d at 1263 (Pet. App. 25a). It should be noted that two of the three members of the panel which decided this case were members of the panel in *MCI Communications Corp.* v. *AT&T*.

[28] Petitioners (Pet. Brief pp. 30-31, n.46) also seek comfort in a line of questions propounded by Commissioner Wiley in the oral argument in Docket No. 19896, in which he inquired as to why FX and CCSA were not specifically mentioned in the *Specialized Common Carrier Services* proceeding. The short answer to petitioners' point is that these are the types of questions frequently used to elicit information and to bring disputed issues into focus. Commissioner Wiley's questions were answered during oral argument (A. 926-27, A. 931-32), and he was obviously satisfied since he voted in favor of the decision which interpreted the order in the *Specialized Common Carrier Services* proceeding as comprehending FX and CCSA.

Moreover, in any event, in Docket No. 19896 the FCC once again proceeded to address itself to the arguments strenuously advanced by AT&T that substantial and significant differences exist between interconnection for FX and CCSA and interconnection for other private line services and that, by reason of these differences, an evidentiary hearing was essential. Once again, after analyzing the entire course of proceedings, and all of AT&T's arguments, the Commission concluded that an interconnection order, including provision for FX and CCSA, should issue.

Analysis of the entire course of proceedings thus makes it apparent that AT&T had clear notice of the Commission's intentions. Over the course of three interrelated proceedings during which jurisdiction with respect to interconnection was explicitly retained —the Commission first held a long adjudicatory hearing in which the subject of interconnection was initially broached. It then conducted a full-scale rule making proceeding in which the parties were put on notice as to the issues, policies and considerations and tentative conclusions in the form of a detailed staff report which discussed the services to be provided by the specialized carriers and their corresponding need for interconnection in the broadest possible terms. All interested parties were given ample opportunity to present their data, views, and comments in an oral presentation before the Commission *en banc*. Finally, the Commission held a third proceeding in which the parties were again given an opportunity in the form of written submission and oral presentation to the Commission to address all the relevant issues. In each proceeding the Commission afforded specific and detailed notice of the matters to be covered. Accordingly, petitioners' argu-

ment that they were denied the notice required by the *Morgan* case is without merit.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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